Tieh Boon Tuck v Evonne Lee Pei Chen & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-2087–09 OF 2012
ZAHARAH IBRAHIM, ANANTHAM KASINATHER AND MAH WENG KWAI JJCA
2 MAY 2013

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Contract — Sale and purchase of property — Specific performance — Extension of completion date — Whether balance purchase price paid by extension date — Whether sale and purchase agreement lawfully terminated — Whether sale and purchase agreement breached by non-payment of balance purchase price — Whether sale and purchase agreement breached by non-payment of late payment interest within extended completion period

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The appellant had entered into a sale and purchase agreement ('SPA') to purchase a property from the respondents. On 27 December 2010, the letter of consent to transfer ('LCT') and charge duly approved by the relevant state authority was forwarded to the appellant's solicitor. Subsequently, the appellant paid the differential sum of RM12,000 to the respondents' solicitor on 27 January 2011. The original completion date was 26 March 2011 but was extended to 26 April 2011 ('the first extended completion date') in order to have the LCT amended, subject to late payment interest being paid by the appellant. On 31 March 2011, the appellant's solicitor paid the redemption sum of RM101,964.87 to the respondents' financier ('CIMB'). After the first extended completion date lapsed, the respondents forwarded the original stamped documents, including the deed of assignment ('DOA') entered into between RHB Bank Bhd and the respondents, to the appellant's solicitor. The appellant then requested the respondents for a further extension of time to settle the balance purchase price to which the respondents agreed. The extended completion date was 30 June 2011 ('the second extended completion date') subject to the appellant paying late payment interest. However, the appellant returned the DOA as the respondents' signatures had not been attested to and dated. The respondents did not return the DOA by the expiry of the second extended completion date but instead issued the notice of termination of the SPA. In the High Court, the appellant prayed for specific performance of the SPA. The respondents argued that they had terminated the SPA lawfully on the ground that the appellant had failed to pay the balance purchase price by the second extended completion date, and the late payment interest. The respondents counterclaimed, seeking, inter alia, a declaration that the SPA had been validly terminated; that they were entitled to forfeit the deposit sum of RM25,000 as liquidated damages and a claim for late payment interest of RM1,647.42. The High Court judge dismissed the appellant's claim

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and allowed the respondents' counterclaim save for the claim for damages. Hence, the present appeal. The issues that arose for the court's determination were whether the appellant breached the SPA by not paying the balance purchase price by the second extended completion date; and whether the appellant breached the SPA by not paying the late payment interest to the respondents within the extended completion period.

Held, allowing the appeal:

(1) The appellant's solicitor paid the redemption sum directly to CIMB instead of to the respondents' solicitor. The court did not agree that by doing so, the appellant had unilaterally varied the terms of the SPA. This was simply because cl 3.02 of the SPA allowed the appellant to pay the redemption sum directly to CIMB. The fact that the redemption sum was paid to CIMB on 31 March 2011 could not be denied. The fact that CIMB did not inform the respondents' solicitor immediately or soon after they had received the redemption sum was a matter between CIMB and the respondents' solicitor. The ensuing delay on the part of the respondents' solicitor by reason of not being informed of the payment of the redemption sum could not fairly and validly be attributed to the appellant (see para 18).

(2) The respondents submitted that as the appellant had failed to call an officer of Public Bank Bhd as a witness to account for the non-payment of the balance purchase price, an adverse inference under s 114(g) of the Evidence Act 1950 ('Act') should be invoked against the appellant. This was not an appropriate case for an s 114(g) adverse inference. The learned trial judge had erred in law in agreeing to invoke the adverse inference. Although the appellant did not call any officer from Public Bank Bhd as a witness, the appellant's solicitor had testified that without the complete set of the security documents, the balance purchase price could not be released. It was not unknown or uncommon in conveyancing practice that a bank or other financial institution would not allow a drawdown until and unless all the security documentation were in place. This was an obvious standard conveyancing practice which the court could take judicial notice of pursuant to s 56 of the Act (see para 23).

(3) The court further noted that as at 30 June 2011, the appellant had paid the total sum of RM139,464.87 towards the purchase of the property. This sum was comprised of the deposit sum of RM25,000 the differential sum of RM12,500 and the redemption sum of RM101,964.87. This accounted for more than half of the purchase price of RM250,000. There was nothing in evidence to suggest that the appellant was not ready, willing and able to complete the SPA. Importantly, there was nothing to suggest that the appellant had intended to abort the purchase and to allow the deposit sum of RM25,000 to be forfeited by the respondents. If

not for the stand-off by the respondents, the appellant would have been able to complete the SPA. Significantly, this was not a case of where a purchaser had no access to funds to complete the transaction (see para 26).

[**Bahasa Malaysia summary**

Perayu telah memasuki perjanjian jual beli ('PJB') untuk membeli hartanah daripada responden-responden. Pada 27 Disember 2010, surat persetujuan untuk pemindahan ('SPP') dan gadaian yang telah pun diluluskan oleh pihak berkuasa negeri berkaitan telah dikemukakan kepada peguamcara perayu. Berikutan itu, perayu telah membayar jumlah perbezaan RM12,000 kepada peguamcara responden-responden pada 27 Januari 2011. Tarikh siap asal adalah pada 26 Mac 2011 tetapi telah dilanjutkan kepada 26 April 2011 ('tarikh siap asal pertama') bagi tujuan meminda SPP, tertakluk kepada bayaran lewat faedah yang perlu dibayar oleh perayu. Pada 31 Mac 2011, peguamcara perayu telah membayar jumlah penebusan RM101,964.87 kepada pembiaya responden-responden ('CIMB'). Selepas tarikh siap asal pertama telah luput, responden-responden telah mengemukakan dokumen-dokumen asal yang telah dimatikan setem, termasuklah surat ikatan penyerahhakan ('SIP') yang dimasuki antara RHB Bank Bhd dan responden-responden, kepada peguamcara perayu. Perayu kemudian memohon responden-responden lanjutan masa lagi untuk menyelesaikan baki harga belian yang mana telah dipersetujui oleh responden-responden. Lanjutan tarikh siap adalah 30 Jun 2011 ('lanjutan tarikh siap kedua') tertakluk kepada perayu membayar bayaran lewat faedah. Walau bagaimanapun, perayu telah mengembalikan SIP itu kerana tandatangan responden-responden tidak diakusaksikan dan tidak bertarikh. Responden-responden tidak mengembalikan SIP itu sebelum atau pada tarikh luput lanjutan tarikh siap kedua tetapi sebaliknya mengeluarkan notis penamatan PJB. Di Mahkamah Tinggi, perayu memohon pelaksanaan spesifik untuk PJB itu. Responden-responden berhujah bahawa mereka telah menamatkan PJB itu dengan sah atas alasan bahawa perayu telah gagal membayar baki harga belian sebelum atau pada tarikh luput lanjutan tarikh siap kedua, dan bayaran lewat faedah. Responden-responden menuntut balas, dengan memohon, antara lain, deklarasi bahawa PJB itu telah ditamatkan dengan sah; bahawa mereka berhak merampas jumlah deposit RM25,000 sebagai ganti rugi yang ditetapkan dan tuntutan untuk bayaran lewat faedah RM1,647.42. Hakim Mahkamah Tinggi telah menolak tuntutan perayu dan membenarkan tuntutan balas responden-responden kecuali tuntutan untuk ganti rugi. Justeru, rayuan ini. Isu-isu yang timbul untuk penentuan mahkamah adalah sama ada perayu telah melanggar PJB itu dengan tidak membayar harga belian sebelum atau pada tarikh luput lanjutan tarikh siap kedua; dan sama ada perayu telah melanggar PJB itu dengan tidak membayar bayaran lewat faedah kepada responden-responden sebelum atau pada lanjutan tarikh siap itu.

Diputuskan, membenarkan rayuan:

(1) Peguamcara perayu telah membayar jumlah penebusan terus kepada

CIMB dan bukan kepada peguamcara responden-responden. Mahkamah tidak bersetuju bahawa dengan berbuat demikian, perayu telah secara unilateral mengubah terma-terma PJB itu. Ini adalah kerana fasal 3,02 PJB membenarkan perayu membayar jumlah penebusan secara terus kepada CIMB. Fakta bahawa CIMB tidak memberitahu peguamcara responden-responden dengan segera atau sejurus selepas mereka telah menerima jumlah penebusan terus merupakan perkara antara CIMB dan peguamcara responden-responden. Kelewatan di pihak peguamcara responden-responden yang tidak diberitahu tentang jumlah penebusan tidak mungkin secara adil dan sah disebabkan oleh perayu (lihat perenggan 18).

(2) Responden-responden berhujah bahawa oleh kerana perayu telah gagal memanggil seorang pegawai Public Bank Bhd sebagai saksi untuk menjelaskan baki harga belian yang tidak dibayar itu, inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 ('Akta') patut digunakan terhadap perayu. Ini bukam kes sesuai untuk inferens bertentangan s 114(g). Hakim perbicaraan yang bijaksana terkhilaf dari segi undang-undang apabila bersetuju menggunakan inferens bertentangan. Walaupun perayu tidak memanggil mana-mana pegawai daripada Public Bank Bhd sebagai saksi, peguamcara perayu memberi keterangan bahawa tanpa set lengkap dokumen-dokumen gadaian, baki harga belian tidak boleh dilepaskan. Ia bukanlah sesuatu yang tidak diketahui atau tidak biasa dalam amalan pemindahhakan untuk bank atau lain lain institusi kewangan untuk lain tidak membenarkan pengeluaran pinjaman sehingga dan kecuali semua dokumentasi sekuriti adalah teratur. Adalah amalan pindah hak yang mengikut piawai di mana mahkamah boleh mengambil notis kehakiman menurut s 56 Akta (lihat perenggan 23).

(3) Mahkamah selanjutnya mengambil maklum bahawa sehingga 30 Jun 2011, perayu telah membayar jumlah keseluruhan RM139,464.87 untuk belian hartanah itu. Jumlah ini terdiri daripada jumlah deposit RM25,000 yang mana jumlah perbezaan RM12,500 dan jumlah penebusan RM101,964.87. Ini merangkumi lebih daripada separuh harga belian RM250,000. Tiada apa-apa dalam keterangan untuk mencadangkan bahawa perayu belum bersedia, tanpa sukarela dan mampu untuk menyiapkan PJB itu. Lebih penting lagi, tiada apa-apa yang mencadangkan bahawa perayu telah berniat untuk membatalkan belian itu dan membenarkan jumlah deposit RM250,000 dirampas oleh responden-responden. Jika bukan kerana pendirian responden-responden, perayu mungkin boleh melaksanakan PJB itu. Adalah nyata ini bukan kes di mana pembeli tiada akses kewangan untuk menyelesaikan transaksi (lihat perenggan 26).]

Notes

For cases on specific performance, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6298–6301.

Cases referred to

Koh Shey Guan v Lee Kok Chan [1971] 1 MLJ 79; [1970] 1 LNS 51, FC (refd)

Lembaga Lebuhraya Malaysia v Semenyih Jaya Sdn Bhd [2010] MLJU 1737; [2011] 3 CLJ 159, CA (refd)

Mulpha Pacific Sdn Bhd v Paramount Corp Bhd [2003] 4 MLJ 357; [2003] 4 CLJ 294, CA (refd)

Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd [2009] 2 MLJ 546; [2009] 1 CLJ 786, CA (refd)

Legislation referred to

Evidence Act 1950 ss 56, 114(g)

Appeal from: Suit No 22 NCVC-1169–12 of 2011 (High Court, Kuala Lumpur)

S'ng Eu Kim (Sulaiman & Taye) for the appellant.

Sim Kok Yew (Mohd Khairi bin Ahmad with him) (KY Sim & Co) for the respondents.

Mah Weng Kwai JCA (delivering judgment of the court):

[1] The central issue in this appeal was whether the sale and purchase agreement dated 8 April 2010 was lawfully terminated by the respondents/the first and second defendants.

BRIEF FACTS

[2] On 8 April 2010 the appellant/plaintiff entered into a sale and purchase agreement to purchase a property in Taman Miharja, Cheras, Kuala Lumpur from the respondents.

[3] On 27 December 2010 the letter of consent to transfer and charge duly approved by the relevant state authority was forwarded to the appellant's solicitor. The appellant proceeded to pay the differential sum (between the balance purchase price and the loan sum) of RM12,000 to the respondents' solicitor on 27 January 2011.

[4] The original completion date was 26 March 2011. By consent of the respondents, the completion date was extended by a month to 26 April 2011

(first extended completion date) in order to have the letter of consent to transfer and charge amended, subject to late payment interest being paid by the appellant.

[5] On 31 March 2011 the appellant's solicitor paid the redemption sum of RM101,964.87 directly to CIMB Bank Bhd ('CIMB'), the respondents' financiers.

[6] After the first extended completion date had lapsed on 26 April 2011, the respondents' solicitor on 12 May 2011 forwarded the original stamped documents including the deed of assignment dated 6 May 2009 entered into between RHB Bank Bhd and the respondents to the appellant's solicitor.

[7] On 20 June 2011, the appellant requested the respondents for a further extension of time to settle the balance purchase price. The respondents agreed and the completion date was extended to 30 June 2011 (second extended completion date) subject to the appellant paying late payment interest.

[8] However, on 22 June 2011, the appellant's solicitor returned the deed of assignment dated 6 May 2009 to the respondents' solicitor as it was defective in that the respondents' signatures had not been attested to and dated.

A reminder was sent by the appellant's solicitor to the respondents' solicitor on 29 June 2011 requesting for the return of the deed of assignment duly attested and at the same time requesting for a further extension of the completion date till 15 July 2011.

[9] The respondents' solicitor did not return the deed of assignment dated 6 May 2009 to the appellant's solicitor by 30 June 2011, the expiry of the second extended completion date, or at any time thereafter. Instead, on 5 July 2011 the respondents' solicitor issued the notice of termination of the sale and purchase agreement to the appellant's solicitor.

THE APPELLANT'S CLAIM

[10] By his statement of claim, the appellant prayed for specific performance of the sale and purchase agreement dated 8 April 2010 within one month from the date of the order together with damages and costs.

THE DEFENCE

[11] The respondents maintained that they had terminated the sale and purchase agreement lawfully on the ground that the appellant had failed to pay the balance purchase price by 30 June 2011, the second extended completion

date, and the late payment interest. In the counterclaim, the respondents sought, inter alia, a declaration that the sale and purchase agreement had been validly terminated, that they were entitled to forfeit the deposit sum of RM25,000 as liquidated damages and a claim for late payment interest of RM1,647.42.

THE HIGH COURT DECISION

[12] After a full trial, the learned trial judge dismissed the appellant's claim and allowed the respondents' counterclaim save for the claim for damages.

[13] Being dissatisfied with the decision, the appellant appealed to the Court of Appeal.

DECISION OF THE COURT

[14] Upon reading the record of appeal, the written submissions of counsel for the appellant and the respondents and upon hearing the oral submissions of counsel aforesaid, the court allowed the appellant's appeal with costs. In allowing prayer (a) of para 30 of the statement of claim the court ordered the respondents to complete the sale and purchase agreement by returning the deed of assignment dated 6 May 2009 duly attested to the appellant's solicitor and in turn, the appellant was ordered to pay the balance purchase price within one month from the date of the order.

[15] The respondents being dissatisfied with the decision of the court, have now applied for leave to appeal to the Federal Court.

GROUNDS OF DECISION

[16] In this appeal, there were two issues that had to be determined by the court namely:

(a) whether the appellant was in breach of the sale and purchase agreement by not paying the balance purchase price by 30 June 2011 (second extended completion date); and

(b) whether the appellant was in breach of the sale and purchase agreement by not paying the late payment interest to the respondents within the extended completion period.

The balance purchase price point

[17] According to cl 3.01(c) the appellant was initially obliged to pay the

balance purchase price and to complete the sale and purchase agreement by 26 March 2011, the original completion date. However, in order for the appellant to amend the letter of consent to transfer and charge the respondents had agreed to extend time by a month up to 26 April 2011 (first extended completion date) subject to late payment interest being paid by the appellant. Pausing here for a moment, it is surprising to observe that it was the appellant who had to pay the late payment interest when it was incumbent upon the respondents to deliver a valid letter of consent to transfer and charge to the appellant in the first instance. Be that as it may, the appellant was not obliged to pay the late payment interest until 26 April 2011.

[18] On 31 March 2011, the appellant's solicitor paid the redemption sum directly to CIMB, the respondents' financiers instead of to the respondents' solicitor. By doing so the respondents' solicitor submitted that the appellant's solicitor had unilaterally varied the terms of the sale and purchase agreement and had caused confusion. The learned trial judge agreed with the respondents that with a direct payment confusion had been created. With respect, we do not agree with the respondents' solicitor's contention that the appellant had unilaterally varied the terms of the sale and purchase agreement and we do not see how any confusion could have been caused. This is simply because cl 3.02 of the sale and purchase agreement allowed the appellant to pay the redemption sum directly to CIMB, the respondents' financiers. The fact that the redemption sum was paid to CIMB on 31 March 2011 cannot be denied as it is an agreed fact stated in para 14 of the statement of agreed facts. The fact that CIMB did not inform the respondents' solicitor immediately or soon after they had received the redemption sum was a matter between CIMB and the respondents' solicitor. The ensuing delay on the part of the respondents' solicitor by reason of not being informed of the payment of the redemption sum cannot fairly and validly be attributed to the appellant.

[19] But the main complaint of the respondents was not when the redemption sum was paid but rather that the appellant had failed to pay the balance purchase price on time and was thus in breach of a fundamental term of the sale and purchase agreement. It will be remembered that by the time the first extended completion date had lapsed on 26 April 2011, the respondents' solicitor had still not forwarded the original stamped security documents including the deed of assignment dated 6 May 2009 to the appellant's solicitor. The documents were only received by the appellant's solicitor on 16 May 2011, some 46 days after the redemption sum had been paid on 31 March 2011. Instead of terminating the sale and purchase agreement due to the delay and a breach by the respondents, the appellant chose to proceed with the sale and purchase agreement and on 20 June 2011 requested the respondents for a further extension of time. The respondents agreed to extend time up to 30 June 2011, the second extended completion date, subject to the appellant paying

late payment interest. Again, it is surprising to observe that the appellant had agreed to pay late payment interest to the respondents. In any event the appellant accepted 30 June 2011 as the completion date.

[20] It is not clear as to why the appellant's solicitor did not act on the original stamped security documents during the period from 12 May–26 June 2011. Notwithstanding, what was adduced in evidence was that the appellant's solicitor returned the deed of assignment dated 6 May 2009 entered into between RHB Bank Bhd and the respondents, to the respondents' solicitor as the same was defective in that there was no attestation to the respondents' signatures and there was no date. The appellant at the same time had requested the respondents to further extend the time for completion till 15 July 2011. The respondents instead of returning the deed of assignment dated 6 May 2009 duly amended as requested, kept silent till the notice of termination dated 5 July 2011 was issued to the appellant's solicitor.

[21] Obviously, by 30 June 2011 the deed of assignment had not been forwarded by the appellant's solicitor to Public Bank Bhd, the appellant's financiers and no balance purchase price was paid by Public Bank Bhd to the respondents. The respondents' position, to which the learned trial judge agreed, was that the appellant was responsible for the delay in noticing the defect in the deed of assignment and returning it to the respondents' solicitor just eight days before the completion date. With respect, we do not see why the appellant should be held responsible for the omission by the respondents. To begin with, it was incumbent on the respondents to forward all the relevant original stamped security documents in good order to the appellant's solicitor. The fact that the deed of assignment was defective was a responsibility which the respondents had to bear.

[22] Now, without the relevant documents being forwarded to Public Bank Bhd, it was not surprising that the balance purchase price was not paid by the appellant. But the question is should the appellant be faulted for not paying the balance purchase price by 30 June 2011. We do not think so considering the provisions of cll 3.03 and 7.01 of the sale and purchase agreement.

[23] The respondents contended that the appellant had failed to prove that Public Bank Bhd did not release the balance purchase price for want of a valid deed of assignment. The respondents submitted that as the appellant had failed to call an officer of Public Bank Bhd as a witness to account for the non-payment of the balance purchase price, an adverse inference under s 114(g) of the Evidence Act 1950 should be invoked against the appellant. In our judgment we are of the view that this was not an appropriate case for a s 114(g) adverse inference to be invoked. With respect, we are of the view that the learned trial judge had erred in law in agreeing to invoke the adverse

inference. Although the appellant did not call any officer from Public Bank Bhd as a witness, the appellant's solicitor ('DW1') had testified that without the complete set of the security documents, the balance purchase price could not be released. It is not unknown or uncommon in conveyancing practice that a bank or other financial institution will not allow a drawdown until and unless all the security documentation are in place. This is an obvious standard conveyancing practice which the court can take judicial notice of pursuant to s 56 of the Evidence Act 1950 (see the case of *Lembaga Lebuhraya Malaysia v Semenyih Jaya Sdn Bhd* [2010] MLJU 1737; [2011] 3 CLJ 159 where His Lordship Abdul Malik Ishak JCA delivering the majority judgment of the court held that 'courts will take judicial notice of various matters that are so notorious or clearly established that evidence of their existence is unnecessary').

[24] In so far as the deed of assignment was concerned the court noted from the evidence of DW1, that the deed of assignment had been duly amended and was in the possession of the respondents' solicitor as at 1 July 2011. However the same was not forwarded to the appellant's solicitor as the respondents' solicitor had no instructions to do so.

[25] In the circumstances, the respondents ought to have returned the deed of assignment duly amended to enable the appellant to present the same to Public Bank Bhd in order for the balance purchase price to be drawn down. Accordingly, the appellant was not in breach of a fundamental term of the sale and purchase agreement.

[26] The court further noted that as at 30 June 2011 the appellant had paid the total sum of RM139,464.87 towards the purchase of the property. This sum was comprised of the deposit sum of RM25,000 the differential sum of RM12,500 and the redemption sum of RM101,964.87. This accounted for more than half of the purchase price of RM250,000. There was nothing in evidence to suggest that the appellant was not ready, willing and able to complete the sale and purchase agreement. Importantly, there was nothing to suggest that the appellant had intended to abort the purchase and to allow the deposit sum of RM25,000 to be forfeited by the respondents. As such, the court is of the view that if not for the stand off by the respondents, the appellant would have been able to complete the sale and purchase agreement. Significantly, this was not a case of where a purchaser had no access to funds to complete the transaction.

In *Koh Shey Guan v Lee Kok Chan* [1971] 1 MLJ 79; [1970] 1 LNS 51, the Federal Court held that it was not unusual or unreasonable for a purchaser to request for an extension of time to complete the transaction and the request itself would clearly establish that the purchaser was at all times ready and

willing to complete the purchase.

The late payment interest point

[27] The respondents contended that the appellant was in breach of a fundamental term of the sale and purchase agreement when he failed to pay the late payment interest within the time of completion of the sale and purchase agreement.

[28] It will be noted that no late payment interest was due and payable by the original completion date of 26 March 2011. The late payment interest only became due and payable for the period after 26 March–26 April 2011, the first extended completion date.

[29] It must be further noted that the first extended completion date was further extended to 30 June 2011, the second extended completion date. Although the appellant was contractually bound and therefore obliged to pay the late payment interest on or before the expiry of the completion period, what this in effect meant was that the appellant had until the 30 June 2011 to pay the accrued late payment interest. There was no issue of payment of late payment interest by 26 April 2011 as the respondents had agreed to extend time up to 30 June 2011. The delay in payment if any had been effectively waived by the respondents.

[30] The question that remains to be determined was whether the appellant was bound to pay the late payment interest by 30 June 2011 given the fact that the respondents had failed to return the deed of assignment duly amended to the appellant's solicitor by 30 June 2011, as requested. In our judgment, we are of the view that the appellant was not in breach of cl 4.01 of the sale and purchase agreement when he did not pay any late payment interest by 30 June 2011 as the respondents themselves were in breach of the sale and purchase agreement for reasons as discussed earlier.

Counsel for the respondents cited the cases of *Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd* [2009] 2 MLJ 546; [2009] 1 CLJ 786 (CA) and *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357; [2003] 4 CLJ 294 (CA) in support in his contention that the provision of cl 4.01 of the sale and purchase agreement was clear and unambiguous and that the court should give a literal and natural interpretation to it. While this court does not disagree with what was held by the Court of Appeal in the two cases cited, we reiterate that it is our finding that the appellant was not in breach of cl 4.01.

[31] In any event, as submitted by counsel for the appellant, and with which

the court agrees, there was no evidence at all adduced at trial by the respondents to show that they had informed the appellant of the amount calculated to be due and payable by way of late payment interest. According to DW1 the late payment interest was not, apart from the contractual provisions, claimed by the respondents at the material time. DW1 went on to say in evidence that it was usual practice for late payment interest to be paid together with the balance purchase price. Again, the court can take judicial notice of this contention as being standard conveyancing practice. Frequently, in practice the amount of the late payment interest will be quantified and notified to the purchaser by the vendor's solicitor, to be paid together with the balance purchase price before vacant possession of the property will be delivered to the purchaser.

CONCLUSION

[32] With respect, we are of the view that the learned trial judge erred in law and in fact in not granting the order for specific performance to the appellant. Given the factual matrix, it cannot be gainsaid that the appellant did not come to court with clean hands to seek equitable relief. The appellant did not fail to pay the balance purchase price and the late payment interest within the time provided for in the sale and purchase agreement.

[33] In the result, the appeal was allowed with costs of RM30,000 here and below. The appellant was ordered to pay the balance purchase price within one month of the order.

Appeal allowed.

Reported by Afiq Mohamad Noor